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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THEA GELLER, Plaintiff and Respondent, v. WEDBUSH MORGAN SECURITIES, INC. et al. Defendants and Appellants.	B211579 (Los Angeles County Super. Ct. No. BC392004)

APPEAL from an order of the Superior Court of Los Angeles County, Alan S. Rosenfield, Judge. Affirmed.

John W. Stenson for Defendants and Appellants.

Law Offices of Lauren Abrams, Lauren Mayo-Abrams, Marqui Hood and Elisabeth Sedano for Plaintiff and Respondent.

Wedbush Morgan Securities, Inc. (Wedbush Morgan), Wedbush, Inc. and its managing agents G. William Ott III, Edward Wedbush, Kevin Lunby and V. Thomas Hale appeal from an order denying their motion to compel arbitration of Thea Geller's complaint for sexual harassment and discrimination, retaliation, wrongful termination and related employment claims. The trial court concluded the arbitration provision in untitled, single-page forms prepared by Wedbush Morgan and signed by Geller, which read, "I also agree to submit to arbitration any and all disputes that may occur between Wedbush Morgan Securities, Inc. and me" was unilateral, unconscionable and unenforceable. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Parties*

Wedbush Morgan is a full service investment banking and securities brokerage firm. Geller began working at Wedbush Morgan in August 1993. By 2001 she had become vice president in charge of mutual funds and managed assets.

2. *Geller's Complaint*

In June 2008 Geller filed a complaint in superior court alleging causes of action for sex discrimination, sexual harassment, age discrimination and retaliation under the Fair Employment and Housing Act (Gov. Code, § 12940 et seq.), wrongful termination in violation of public policy, defamation and failure to pay wages. She named Wedbush Morgan, Wedbush, Inc., Ott, Wedbush, Lunby and Hale as defendants.

According to Geller, in early 2005 she began being subjected to repeated and unwanted sexual advances by Ott, a department manager at Wedbush Morgan. Her complaints about Ott's behavior to Wedbush Morgan's managing agents went unheeded. Instead of addressing Ott's behavior, Wedbush Morgan retaliated against Geller through negative performance reviews and ultimately terminated her employment in June 2006.

3. *The Motion to Compel Arbitration*

In July 2008 Wedbush Morgan, Wedbush, Inc., and the individual defendants moved to compel arbitration of Geller's complaint. In its supporting papers Wedbush

Morgan explained it is a member of the Financial Industry Regulatory Authority (FINRA), a private corporation that acts as a self-regulatory organization under contracts with brokerage firms and trading markets. When Geller began working at Wedbush Morgan in 1993, she signed a uniform application to register with various securities associations including the National Association of Security Dealers (NASD), the predecessor to FINRA.[1] The application for registration, known as a U-4 application,[2] included an arbitration provision that read, "I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations indicated in item 10[3] as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgment in any court of competent jurisdiction."

Rule 13200 of FINRA's Code of Arbitration for Industry Disputes (Code of Arbitration) requires any dispute "arising out of the business activities of a member and associated members" to be arbitrated in accordance with FINRA procedures unless otherwise provided in the Code of Arbitration. Wedbush Morgan acknowledged that Rule 13201 of the Code of Arbitration exempts from this arbitration requirement statutory-based discrimination and sexual harassment claims absent a separate agreement

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1 The NASD officially changed its name to FINRA on July 30, 2007. (See <<http://www.finra.org [as of December 21, 2009]**.)**

2 A broker or seller of securities is required under both California and federal law to register with FINRA and the New York Stock Exchange as a condition of selling or trading securities. (See Cal. Code Regs., tit. 10, § 260.210, subd. (a) ["[u]pon employment of an individual as an agent, a broker-dealer shall (1) obtain a properly executed application for registration, on the Uniform Application for Securities Industry Registration and Transfer Form ('Form U-4')"]; see also 17 C.F.R. § 240.15b7-1 (2009).)

3 Item 10 in the U-4 application lists various self-regulatory organizations and requires the applicant to check a box next to each organization with which he or she seeks registration. Among others, Geller checked the NASD and the New York Stock Exchange.

to arbitrate those claims.[4] Thus, to support its motion to compel arbitration of Geller's complaint, Wedbush Morgan relied on two untitled forms signed by Geller, one in 1993 and one in 1995, arguing they constituted separate agreements to arbitrate any employment-related claim, including necessarily harassment and discrimination claims.

Apart from some minor differences not affecting the arbitration provision in either document, both the 1993 and the 1995 forms are identical. Each form is less than one page and contains five short paragraphs:

The first paragraph provides, "I have read and understand the Policies and Procedures" for Wedbush and "recognize that the Company may change, cancel or add to the policies and procedures as described in this [employment] manual at any time, either orally or in writing."

The second paragraph provides, unless expressly agreed otherwise in writing, "I also understand that my employment is terminable at will at any time either by me or by the Company for any reason."

The third paragraph provides, "I agree to return all Company property at the end of my employment" and, "in the event I have received an advance or owe any money to the Company, I request and authorize that any such amount be deducted from my last pay check."

The fourth paragraph (the arbitration provision) provides, "I also agree to submit to arbitration any and all disputes that may occur between Wedbush Morgan Securities, Inc. and me."

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4 Rule 13201 of the Code of Arbitration provides, "A claim alleging employment discrimination, including sexual harassment in violation of a statute, is not required to be arbitrated" under FINRA arbitration contracts unless the parties have separately agreed to arbitrate it, either before or after the dispute arose. "If the parties agree to arbitrate such a claim, the claim will be administered under Rule 13802," of FINRA's arbitration rules. (See <<http://www.finra.org/arbitrationmediation /index.htm [FINRA's code of arbitration] [as of December 21, 2009].)

The fifth paragraph contains an acknowledgment of the receipt of an internal memorandum on insider trading prevention procedures and receipt of an employee safety training booklet.

Geller opposed the motion to compel arbitration, arguing, among other things, the arbitration provisions contained in the 1993 and 1995 forms were unconscionable and unenforceable.

4. *The Trial Court's Ruling Denying the Motion to Compel Arbitration*

The trial court denied the motion to compel arbitration. The court concluded the arbitration provisions in both the 1993 and 1995 forms had some elements of procedural unconscionability—both forms were provided to Geller on a take-it-or-leave-it basis as a condition of her employment—and were substantively unconscionable because the agreement to arbitrate was unilateral, requiring Geller to submit her claims against Wedbush Morgan to arbitration but imposing no reciprocal requirement on the company. The court held the unconscionable nature of the agreement to arbitrate permeated the entire agreement, rendering it unenforceable.

Wedbush Morgan and the other defendants filed a timely notice of appeal.

DISCUSSION

1. *Standard of Review*

A petition to compel arbitration based on a written arbitration agreement must be granted unless grounds exist to revoke the agreement. (Code Civ. Proc., §§ 1281, 1281.2, subd. (b).) Like any other contract, an agreement to arbitrate is subject to revocation if the agreement is unconscionable. (See Civ. Code, § 1670.5, subd. (a) ["[i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result"]; *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 98 (*Armendariz*).)

Absent conflicting extrinsic evidence, the validity of an arbitration clause, including whether it is subject to revocation on unconscionability grounds, is a question of law subject to de novo review. (*Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1468 (*Roman*); *Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1277.)

2. *The Arbitration Provisions in the 1993 and 1995 Untitled Forms Are Unconscionable*

a. *Governing law on unconscionability*

Unconscionability has both procedural and substantive elements. (*Armendariz, supra*, 24 Cal.4th at p. 99; *Jones v. Wells Fargo Bank* (2003) 112 Cal.App.4th 1527, 1539.) Although both are required for a court to invalidate a contract or one of its individual terms (*Armendariz*, at p. 114; *Wayne v. Staples, Inc.* (2006) 135 Cal.App.4th 466, 482; *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 174), they need not be present in the same degree: "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Armendariz*, at p. 114; see *Roman, supra*, 172 Cal.App.4th at p. 1469; *Wayne*, at p. 482.)

Procedural unconscionability focuses on the elements of oppression and surprise. (*Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 160; *Roman, supra*, 172 Cal.App.4th at p. 1469; *Wayne, supra*, 135 Cal.App.4th at pp. 480-481.) """"Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice. . . . Surprise involves the extent to which the terms of the bargain are hidden in a "prolix printed form" drafted by a party in a superior bargaining position."""" (*Wayne*, at p. 480; *Roman*, at p. 1469; see also *Mercuro v. Superior Court, supra*, 96 Cal.App.4th at p. 174 ["procedural unconscionability focuses on the oppressiveness of the stronger party's conduct"].)

Substantive unconscionability focuses on the actual terms of the agreement and whether they create "overly harsh" or "one-sided" results (*Armendariz, supra*, 24 Cal.4th at p. 114; accord, *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071 (*Little*)), that

is, whether contractual provisions reallocate risks in an objectively unreasonable or unexpected manner. (*Jones v. Wells Fargo Bank, supra,* 112 Cal.App.4th at p. 1539.) Substantive unconscionability "may take many forms," but frequently is found in the employment context when the arbitration agreement is "one-sided" in favor of the employer without sufficient justification, for example, when "the employee's claims against the employer, but not the employer's claims against the employee, are subject to arbitration." (*Little*, at p. 1072; see also *Armendariz*, at p. 117 ["[i]t is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee, without at least some reasonable justification for such one-sidedness based on 'business realities'"]; *Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1330 ["'[s]ubstantive unconscionability' focuses on the terms of the agreement and whether those terms are 'so one-sided as to "shock the conscience"'"].)

b. *The arbitration provisions in the 1993 and 1995 forms are part of an adhesion contract*

The arbitration provisions in the preprinted 1993 and 1995 forms prepared by Wedbush Morgan were adhesive in nature, offered to Geller on a take-it-or-leave-it basis as a condition of her employment (or a condition of her continuing employment) with no opportunity for negotiation. The Supreme Court has acknowledged that adhesion contracts in the employment context typically contain some measure of procedural unconscionability. (See *Armendariz, supra,* 24 Cal.4th at p. 115 ["[i]n the case of preemployment arbitration contracts, the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement"]; accord, *Little, supra,* 29 Cal.4th at p. 1071; *Roman, supra,* 172 Cal.App.4th at p. 1470.)[5]

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5 Of course, the adhesive nature of the contract will not always make it procedurally unconscionable. When bargaining power is not grossly unequal and reasonable alternatives exist, oppression typically inherent in adhesion contracts is minimal. (See

As Wedbush Morgan observes, apart from the general adhesive nature of the 1993 and 1995 forms, the element of procedural unconscionability in this case was fairly minimal. Although the arbitration provisions themselves were not initialed, they were each set forth succinctly, in a separate paragraph, on a form that was less than a page in length. (See, e.g., *Roman, supra,* 172 Cal.App.4th at p. 1471 [procedural unconscionability minimal when arbitration provision clearly set forth in a separate, succinct paragraph]; cf. *Higgins v. Superior Court* (2006) 140 Cal.App.4th 1238, 1252-1253 [procedural unconscionability high when arbitration provision was buried in 24-page, single-spaced document].) Therefore, to invalidate such an agreement on unconscionability grounds, the level of substantive unconscionability must be significant. (See *Armendariz, supra,* 24 Cal.4th at p. 114 [the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to make the term unenforceable]; *Roman,* at p. 1498.) It is.

c. *The agreement to arbitrate contained in the 1993 and 1995 employment forms is unilateral in nature*

The arbitration provision in both the 1993 and 1995 forms is unilateral. The plain language of the provision requires Geller to submit her claims against Wedbush Morgan to arbitration without imposing a reciprocal requirement on Wedbush Morgan. (See *Mercuro v. Superior Court, supra,* 96 Cal.App.4th at pp. 177-178 [arbitration agreement is unconscionable when employer requires weaker party, the employee, to arbitrate employee's claims while preserving for itself the option of litigating its own claims against employees in court; in such a case the agreement is "permeated" by unconscionability and unenforceable].)

Relying on our recent opinion in *Roman, supra,* 172 Cal.App.4th 1462, Wedbush Morgan insists the pre-*Armendariz* arbitration provision in the 1993 and 1995 forms

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Roman, supra, 172 Cal.App.4th 1462, 1470, fn. 2; see also *Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.* (2001) 89 Cal.App.4th 1042, 1056 [contract of adhesion is not dispositive on question of procedural unconscionability; where complaining party had access to alternatives, procedural unfairness of adhesive contract minimal].)

creates an enforceable, mutual agreement to arbitrate. To the contrary, our analysis in *Roman* underscores the unilateral nature of the Wedbush Morgan arbitration agreement.

In *Roman* we affirmed the trial court's grant of a petition to compel arbitration based on an arbitration provision that read, "I agree, in the event I am hired by the company, that all disputes and claims that might arise out of my employment with the company will be submitted to binding arbitration." We explained the arbitration provision itself was bilateral: It required "all claims" arising out of the employee's employment to be arbitrated, whether those claims were initiated by the employee or the employer. We held the mere insertion of the words "I agree" in an otherwise bilateral arbitration clause did not destroy the bilateral nature of the agreement to arbitrate. (*Roman, supra,* 172 Cal.App.4th at p. 1473.)

In relying on *Roman, supra,* 172 Cal.App.4th 1462, Wedbush Morgan misapprehends the elements of its arbitration provision that make it unconscionable. It is not the phrase "I agree" that creates the problem, but rather the rest of the arbitration provision itself. Unlike in *Roman,* the arbitration clause here does not provide that any and all disputes will be submitted to arbitration, language that would have indicated an intent to resolve any employment-related dispute by arbitration regardless of who initiated it. Rather, it provides that Geller must submit *her* claims to arbitration. Nothing in the single sentence mandating arbitration suggests a corresponding obligation on Wedbush Morgan to arbitrate its claims.

In fact, far from approximating the arbitration provision we upheld in *Roman,* the arbitration clause in this case more closely resembles the unilateral—and unconscionable—arbitration provision in *O'Hare v. Municipal Resource Consultants* (2003) 107 Cal.App.4th 267, which provided, "[a]ny claim that you [employee] may have arising out of or relating to this Agreement, or the breach thereof, or your employment . . . or the termination of your employment . . . shall be settled by binding arbitration." (*Id.* at p. 271 [arbitration provision unilateral and unconscionable because it imposed obligation to arbitrate only on employee]; see also *Nyulassy v. Lockheed Martin Corp., supra,* 120 Cal.App.4th at pp. 1282-1283 [obligation to arbitrate triggered only by the

employee's objection or disagreement with a personnel decision relating to or affecting his or her employment lacked mutuality].)

Our conclusion the arbitration provision is unilateral is reinforced by the context in which it appears. (See, e.g., *Employers Reinsurance Co. v. Superior Court* (2008) 161 Cal.App.4th 906, 919 [in interpreting arbitration provision in an agreement, "[w]e consider the contract as a whole and interpret the language in context, rather than interpret a provision in isolation"]; accord, *Thompson v. Toll Dublin, LLC* (2008) 165 Cal.App.4th 1360, 1370.) Apart from the mutual provision acknowledging Geller's at-will status, the rest of the five-paragraph form in which the arbitration provision is contained is essentially a statement of Wedbush Morgan's rights and Geller's relinquishment of her own: "I recognize the company may change, cancel or add to the policies and procedures described in this [employment] handbook at any time, either orally or in writing," and "I must accept the policies and procedures in this handbook as a condition of my employment." "I agree to return all Company property at the end of my employment" and to "repay monies owed" and authorize Wedbush Morgan to "deduct[][such money owed] from my last pay check." In addition to the foregoing relinquishment of rights, Geller "also agree[s] to submit to arbitration" any disputes between her and Wedbush Morgan.

The fact the arbitration clause appears in a form in which Geller acknowledges Wedbush Morgan's rights as her employer is, of course, not dispositive. Provisions articulating an employer's right to change its employment handbook and requiring the return of company property upon termination of employment, at least in the abstract, are not likely themselves to be substantively unconscionable. Including a bilateral arbitration provision in such an agreement plainly would not alter the nature of the otherwise mutual obligation to arbitrate. But, this arbitration provision is far from bilateral. The context in which it appears simply underscores that conclusion.

d. *The 1993 and 1995 employment forms do not incorporate FINRA's Code of Arbitration*

Wedbush Morgan contends that, even though the plain language of the 1993 and 1995 arbitration provisions may suggest a lack of mutuality, when interpreted jointly with FINRA's arbitration requirements, those provisions do not create a unilateral obligation to arbitrate. That is, FINRA requires Wedbush Morgan and its registered employees to arbitrate any claim arising out of the business activities of a member or associated person except for the employee's statutory employment claims; arbitration of statutory employment claims is permitted only if there is a separate agreement to arbitrate those claims. Accordingly, the separate agreement to arbitrate those claims exempted from FINRA's arbitration requirements will always be, by its very nature, unilateral. Nonetheless, Wedbush Morgan argues, when considered together with Wedbush Morgan's obligation to arbitrate all of its claims under FINRA, the 1993 and 1995 arbitration provisions are part of an all-encompassing mutually binding arbitration agreement.

Wedbush Morgan's characterization of an overall bilateral obligation to arbitrate might be more persuasive if, in fact, the purpose of the 1993 and 1995 arbitration provisions had been simply to create a separate agreement to arbitrate claims otherwise exempted from FINRA's arbitration rules. However, when Geller signed the 1993 and 1995 arbitration provisions, which refer generally to all of Geller's claims against Wedbush Morgan, there was no need to have a separate agreement relating to statutory employment discrimination claims; and the only extrinsic evidence offered by Wedbush Morgan confirms those two agreements were not intended to be interpreted jointly with FINRA or NASD arbitration requirements.[6] Indeed, the forms do not even refer to, much

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6 As Wedbush Morgan acknowledged in its motion to compel arbitration, when Geller signed the arbitration forms in 1993 and 1995, statutory employment claims were included in the NASD's arbitration rules. The exemption for statutory employment claims was created in 1998 when the NASD changed its arbitration provisions to conform the securities industry's arbitration policies to a 1997 policy statement by the Equal Employment Opportunity Commission concluding that predispute agreements to arbitrate

less incorporate, the arbitration provisions or procedures established by FINRA or its NASD predecessor, nor do they mention the U-4 form.

Because there is nothing on the face of the 1993 and 1995 employment forms to indicate they were intended to be interpreted jointly with the U-4 form or with NASD's (or FINRA's) arbitration provisions, and Wedbush Morgan offers no extrinsic evidence to suggest otherwise, we are compelled to interpret the 1993 and 1995 employment forms as separate, independent agreements. As such, the unilateral obligation to arbitrate contained in each agreement is unconscionable and, therefore, unenforceable.[7]

Finally, Geller contends the agreement to arbitrate is substantively unconscionable because it fails to contain procedural safeguards confirming her right to adequate discovery, a neutral abitrator and a cost provision that requires the employer to pay costs unique to the arbitration. (See *Armendariz, supra,* 24 Cal.4th at pp. 103-113 [requiring minimal safeguards, which will be inferred in event agreement is silent].) Wedbush Morgan, on the other hand, insists those protections are part of FINRA's arbitration procedures (see *McManus v. CIBC World Markets Corp.* (2003) 109 Cal.App.4th 76, 94-96 [FINRA's arbitration procedures comply with *Armendariz* requirements]), and the

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statutory discrimination claims were inconsistent with federal civil rights laws. (See SEC Release No. 34-40479 (Sept. 24, 1998) http://www.sec.gov/rules/sro/ny9828n.htm ["In July 1997, the U.S. Equal Employment Opportunity Commission ('EEOC') issued a policy statement that mandatory predispute agreements to arbitrate statutory discrimination claims are inconsistent with the purpose of the federal civil rights laws. (fn. omitted.) [¶] . . . [¶] The Exchange's proposed amendments will limit the availability of the Exchange's forum for the resolution of employment discrimination claims to those cases where the parties have agreed to arbitrate the claim after it has arisen, as recommended by the EEOC."].) Later, the NASD rules were changed again to allow for separate predispute and postdispute agreements to arbitrate discrimination claims. (See fn. 4, above.)

7 Even considering Wedbush Morgan's obligation to arbitrate under FINRA together with the 1993 and 1995 employment forms, the overall obligation to arbitrate is not entirely bilateral. The obligation to arbitrate under FINRA is restricted to claims arising out of the member's business activities. Any other claim brought by Wedbush Morgan against Geller would not be subject to arbitration. All of Geller's claims against Wedbush Morgan, however, including claims not arising out of business activities, would have to be arbitrated under the 1993 and 1995 arbitration provisions.

separate agreements to arbitrate in the 1993 and 1995 forms merely invoke the U-4 arbitration provision with all of its attendant requirements. Because we hold the arbitration clauses in the 1993 and 1995 forms are unilateral and unenforceable, we need not resolve this additional claim of substantive unconscionability. (See *Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 657 ["the paramount consideration in assessing conscionability is mutuality"; unilateral nature of arbitration clause permeates entire agreement and renders agreement to arbitrate unenforceable].)[8]

DISPOSITION

The order is affirmed. Geller is to recover her costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.

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8 Likewise, because we find the agreement to arbitrate unenforceable, we need not consider whether, as nonsignatories to the arbitration agreement, the individual defendants would be bound by the arbitration agreement.